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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESSE DEVLIN QUIMING, Defendant and Appellant.	H043494 (Monterey County Super. Ct. No. SS151045A)

I. INTRODUCTION

Defendant Jesse Devlin Quiming appeals after a jury convicted him of first degree murder (Pen. Code, § 187, subd. (a))[1] and attempted voluntary manslaughter (§§ 664/192, subd. (a)) and found true allegations that defendant personally used a deadly weapon (§ 12022, subd. (b)(1)) as to both counts and personally inflicted great bodily injury in the commission of the attempted voluntary manslaughter (§ 12022.7, subd. (a)). The trial court found true allegations that defendant had a strike prior (§ 1170.12, subd. (c)(1)) and a prior serious felony conviction (§ 667, subd. (a)(1)), and it sentenced defendant to a prison term of 56 years to life.

On appeal, defendant contends the trial court erred by (1) failing to inquire into defendant's mental competence prior to the sentencing hearing, (2) failing to instruct on imperfect self-defense, (3) failing to instruct on imperfect heat of passion and refusing to

[1] All further statutory references are to the Penal Code unless otherwise indicated.

instruct on provocation, (4) denying defendant's motion for a mistrial after a witness mentioned defendant's prior arrest, and (5) admitting a witness's prior statement. Defendant also contends the prosecutor committed misconduct by (1) misstating the evidence, (2) commenting on defendant's failure to testify, (3) misstating the law, (4) referencing his own personal experience, (5) failing to admonish a witness about a pretrial ruling, and (6) failing to follow a trial court order regarding an exhibit. Defendant asserts that his trial counsel was ineffective for failing to object to various instances of prosecutorial misconduct. Finally, defendant contends the cumulative effect of the errors requires reversal.

In an opinion filed September 12, 2018, we affirmed the judgment. Defendant petitioned the California Supreme Court for review. On December 19, 2018, the California Supreme Court granted review, S252103, and transferred the matter to this court with directions to vacate our decision and to reconsider the case in light of Senate Bill No. 1393, which became effective on January 1, 2019. Senate Bill No. 1393 gives trial courts the discretion to strike prior serious felony convictions for purposes of the five-year sentence enhancement under section 667, subdivision (a)(1). (Sen. Bill No. 1393 (2017-2018 Reg. Sess.), Stats. 2018, ch. 1013, § 1 [amending § 667, subd. (a)(1)], § 2 [amending § 1385, subd. (b)].)

In supplemental briefing, defendant contends that remand is required to permit the trial court to exercise its discretion to strike his prior serious felony conviction. Defendant also contends that the case should be remanded for the trial court to determine whether he is eligible for mental health diversion pursuant to section 1001.36.

We hereby vacate our previous decision. Having reconsidered the cause in light of Senate Bill No. 1393, we reverse and remand the matter for resentencing to allow the trial court to exercise its discretion regarding whether to strike defendant's prior serious felony conviction. The trial court shall also consider upon remand whether either former

or current section 1001.36 applies retroactively to defendant and, if so, whether defendant is eligible for mental health diversion under the terms of the statute.

II. BACKGROUND

Just after midnight on June 19, 2015, defendant stabbed Scott Long and Tyler Misamore. The stabbings took place behind the Monterey public library, in an area where the homeless community tended to "hang out." Long was killed, but Misamore survived. At trial, three eyewitnesses to the incident testified: Misamore, his girlfriend Jasmine Abercrombie, and Joseph Becerra.

A. The Stabbings

Becerra was lying down near defendant while Misamore, Long, and Abercrombie were drinking vodka. Defendant got up and asked if he could "hit that," meaning drink some of the vodka. Long told defendant, "No," and criticized defendant for failing to introduce himself. Defendant sat down and appeared to "brood[] on" what had just happened.

About 10 minutes later, defendant asked Abercrombie if he could use her lighter. According to Misamore, defendant lit a cigarette and then started stabbing Long. According to Abercrombie, defendant lit a cigarette and then lay down for about 10 minutes before getting back up and stabbing Long.

As defendant was stabbing Long, Misamore tried to intervene: he approached defendant from behind and put his arm around defendant's neck. Defendant stabbed Misamore in the side, causing them both to fall down. Misamore tried to grab the knife, but defendant "pulled back," cutting Misamore's fingers. Misamore yelled to Abercrombie, telling her that "the guy had a knife." Defendant then got up and ran away, leaving his sleeping bag and a backpack behind.

Becerra heard defendant get up, go ask for a lighter, and return to his sleeping bag. Becerra then heard "some scuffling." Becerra heard Abercrombie scream, "He's got a

knife." Becerra heard "more scuffling," then saw defendant run towards the front of the library. Becerra did not see Long, Misamore, or Abercrombie with any weapons.

Abercrombie went to the police station, which was across the street from the library. She reported the stabbing and described the perpetrator as a male who was about 5 feet 6 inches tall and was wearing a blue sweatshirt and denim pants or jeans.

An officer responded to the library, where he discovered Long, who was in a seated position, holding a iPhone and an iPad. Long had no pulse, so the officer began administering CPR.

Misamore told police that he had been stabbed and "chased around" by defendant. Misamore said that defendant had asked to drink with Misamore's group and was rebuffed. After lying down for about 10 minutes, defendant had "jumped up" and started stabbing Long. Misamore had then jumped up to help Long. Misamore put defendant in a headlock, and defendant stabbed him a few times before running off. Misamore asserted that the stabbing was "not provoked" and that defendant was "psychotic." Misamore took defendant's belongings—including a backpack—after defendant left.

Becerra told the police that defendant had made "an aggressive motion towards Long" and that defendant had then either punched or pushed Long, causing Long to fall backwards and hit his head on a retaining wall. At that point, Misamore jumped on defendant's back and pulled him away from Long.

B. Investigation

Long had a stab wound in his chest and three stab wounds in his armpit area. The stab wound to his chest had gone in a "downward" direction and had penetrated his heart. Two of the armpit area stab wounds had gone in at upward angles. Long also had some abrasions and contusions, which were consistent with defensive wounds. Long had two "multi tools" in his pocket, but both were in a closed position. Long had a blood alcohol level of 0.31 at the time of his death.

An officer found an empty black knife sheath next to defendant's bedding. The sheath looked the same as a knife sheath found in defendant's possession on May 25, 2015 (about one month before the stabbings), when City of Monterey Police Officer Brian Nino contacted defendant.

Inside defendant's backpack was a knife in a tan sheath, which was similar to a second knife found in defendant's possession on May 25, 2015. There was no blood on the sheathed knife.

A few days after the stabbing, a woman brought a knife to the police department. She had found the knife in a yard where she was doing some gardening work. The knife had the same grip as the black sheathed knife that defendant possessed on May 25, 2015.

C. Defendant's Statements and Arrest

On the night of June 19, 2015, Marla Tillery was driving home from a restaurant with some friends. Defendant approached her car and asked "if he could go home" with her. Defendant said "that he had killed two people the day before and that they deserved to die." Defendant "went into details" but Tillery could not hear him as she thought about how to leave safely. She told defendant she could not give him a ride. Defendant "politely said 'Thank you, ma'am,' and walked away."

On the night of June 20, 2015, Monterey County Deputy Sheriff Daniel Lopez saw defendant run across Highway 1 near Carmel High School, then hide in some trees and bushes. Deputy Lopez contacted defendant and took him into custody.

When defendant was booked, he had no injuries. He made a statement while being booked: "So how's prison these days?"

D. Charges, Trial, Verdicts, and Sentencing

Defendant was charged with the willful, deliberate, and premeditated murder of Long (§ 187, subd. (a); count 1) and the attempted willful, deliberate, and premeditated murder of Misamore (§§ 664/187, subd. (a); count 2). As to both counts, the prosecution alleged that defendant personally used a deadly weapon (§ 12022, subd. (b)(1)). As to

the attempted murder, the prosecution alleged that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). The prosecution also alleged that defendant had a strike prior (§ 1170.12, subd. (c)(1)) and a prior serious felony conviction (§ 667, subd. (a)(1)).

At trial, the defense rested without presenting any witnesses. The trial court instructed the jury on murder, voluntary manslaughter based on sudden quarrel or heat of passion, attempted murder, and attempted voluntary manslaughter. The trial court also instructed the jury that defendant was not guilty of those crimes "if he was justified in killing or attempting to kill someone in self-defense."

During argument to the jury, defendant's trial counsel argued that defendant had acted in self-defense. He asserted that Misamore and Long "came at" defendant and that his "self preservation" instinct had "kicked in."

In count 1, the jury found defendant guilty of first degree murder. In count 2, the jury found defendant not guilty of attempted murder but guilty of attempted voluntary manslaughter. The jury found true the deadly weapon and great bodily injury allegations, and the trial court found true the strike and prior serious felony allegations.

The trial court imposed an aggregate sentence of 56 years to life. For count 1, the trial court imposed an indeterminate term of 50 years to life with a consecutive one-year term for the deadly weapon enhancement and a consecutive five-year term for the prior serious felony conviction enhancement. The trial court imposed a concurrent six-year term for count 2 and its associated great bodily injury enhancement.

III. DISCUSSION

A. Competency

Defendant contends the trial court erred by failing to inquire into his mental competence prior to the sentencing hearing. He contends that the trial court should have suspended the proceedings under section 1368 because there was substantial evidence

that raised a doubt as to defendant's competence. Defendant asserts that this error violated his due process rights.

1. Proceedings Below

The probation report prepared in advance of defendant's sentencing hearing included statements defendant made to the probation officer in December 2015, following his convictions. Defendant referred to "his mental health problems" and said he had not been taking his medications at the time of the stabbings. Defendant specified that he had been previously diagnosed with depression and bipolar disorder. He told the probation officer he planned "to change his plea in the case to one of insanity." Defendant also planned to prepare a statement for the upcoming sentencing hearing.

A number of letters were submitted on defendant's behalf prior to the February 18, 2016 sentencing hearing.

Two letters were submitted by defendant's aunt, Elizabeth M., a licensed psychiatric social worker with experience treating people with mental illness. In one letter, Elizabeth M. expressed concern that defendant had not been able to "confide in his attorney before his trial" and tell him "all the facts in his case." She described how defendant claimed that voices in his head had caused him to commit the stabbing, and she opined that defendant needed mental health treatment. In the other letter, Elizabeth M. asserted that defendant's mental health had "severely deteriorated during the last few years." She asserted that defendant believed he was "hearing the voice of God who tells him what to do" but that defendant had not told his lawyer about hearing the voice, "due to his paranoia and delusional belief system." Defendant told her "that his voices told him to be quiet and not tell his lawyer details of the case." Defendant had expressed delusional thoughts to her when she visited him in jail. She asked for "an appeal" and for defendant to "get the treatment he needs and deserves."

Elizabeth M. included a summary of four telephone conversations or jail visits she had with defendant. On July 30, 2015, defendant told her "about hearing a voice that told

him what to do, where to sleep, etc. when homeless." On August 28, 2015, defendant said he had been "hearing a voice which was helpful to him and told him what to do." On December 2, 2015, defendant told her about hearing the voice of God and "being led by the spirit." On December 16, 2015, defendant told her "about a female voice and a male voice who are always saying negative things about him like an ongoing conversation." Defendant said he had been seen by a psychiatrist and had started taking Zyprexa.

Defendant's sister wrote a letter in which she indicated she had witnessed defendant's mental illness. She specified that defendant was schizophrenic and that he suffered from delusions, hallucinations, and paranoia. She noted that defendant had suffered "serious head trauma" and that he had begun to change about 10 years earlier. She described how defendant had complained of hearing voices at some point when she met him in Sacramento.

A psychiatric nurse who was acquainted with defendant submitted a letter describing how she had never noticed any "violent tendencies" in defendant. When she saw defendant, "his behavior was in control and pleasant." Nothing had alerted her "mental health nursing intuition."

Another acquaintance of defendant wrote a letter stating that in "all the years" she had known defendant, she "never saw any indication of a violent nature."

Defendant's mother, Melissa Q., submitted a letter "to support a motion for an insanity appeal." She stated that defendant had suffered "two serious head injuries from falls" when he was a teenager and that his personality had changed after that. In 2014, she discovered that defendant was hearing voices. She believed that in the weeks leading up to the stabbing, defendant had been "hearing auditory command hallucinations" and had a "psychotic episode."

A letter from a Florida psychiatrist, Howard Goldman, was also provided. The psychiatrist indicated that the letter was submitted to support an appeal for defendant on

the basis of insanity. Defendant had seen the psychiatrist in 2004 and 2005. He was "suffering from paranoia and psychotic features at that time" and was treated with medication. According to defendant's mother, defendant had remained silent during trial because he heard voices that told him to do so. The psychiatrist felt it was likely that defendant was "extremely mentally ill at the time of his crime."

2. Legal Standards

Section 1368 provides: "(a) If, during the pendency of an action and prior to judgment . . . a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. . . . At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court. [¶] (c) Except as provided in Section 1368.1, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined. . . ."

"A criminal trial of an incompetent person violates his or her federal due process rights. [Citation.] The state Constitution and section 1367 similarly preclude a mentally incompetent defendant's criminal trial or sentencing. [Citations.] A defendant is incompetent to stand trial if the defendant lacks 'sufficient present ability to consult with

his [or her] lawyer with a reasonable degree of rational understanding . . . [or] a rational as well as factual understanding of the proceedings against him [or her].' [Citations.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 194-195 (*Mickel*).)

To raise a doubt about a defendant's competence, there must be "more than 'mere bizarre actions' or statements, or even expert testimony that a defendant is psychopathic, homicidal, or a danger to him- or herself and others. [Citations.]" (*Mickel, supra*, 2 Cal.5th at p. 202.) "[E]ven a history of serious mental illness does not necessarily constitute substantial evidence of incompetence that would require a court to declare a doubt concerning a defendant's competence and to conduct a hearing on that issue. [Citation.]" (*People v. Blair* (2005) 36 Cal.4th 686, 714 (*Blair*), overruled on a different point in *People v. Black* (2014) 58 Cal.4th 912, 919.)

A defendant's trial demeanor is "relevant to, but not dispositive of, the question whether the trial court should have suspended proceedings under section 1368. [Citation.]" (*Mickel, supra*, 2 Cal.5th at p. 202.) " 'Even when a defendant is competent at the commencement of his [or her] trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.' [Citation.]" (*People v. Lightsey* (2012) 54 Cal.4th 668, 690-691 (*Lightsey*).)

"[A] trial court is obligated to conduct a full competency hearing if substantial evidence raises a reasonable doubt that a criminal defendant may be incompetent. . . . The failure to conduct a hearing despite the presence of such substantial evidence is reversible error." (*Lightsey, supra*, 54 Cal.4th at p. 691.)

3. Analysis

Defendant contends there was more than "just substantial" evidence that he was incompetent, referencing the material presented to the trial court prior to the sentencing hearing.

Letters from the defendant's family and friends were not sufficient to raise a doubt as to the competence of the defendant in *Mickel.* In that case, prior to the sentencing hearing, the defendant's mother and father submitted letters in which they expressed their beliefs that the defendant had a mental illness and referred to psychiatrists' reports. (*Mickel, supra,* 2 Cal.5th at p. 201.) Other letters from the defendant's friends and family described defendant as suffering from a mental illness and referenced the defendant's prior treatment by mental health professionals. (*Ibid*.) The California Supreme Court found the trial court did not abuse its discretion by failing to declare a doubt as to the defendant's competence. First, the record showed that the defendant "understood the nature and purpose of the proceedings and was capable of assisting in his own defense." (*Id.* at p. 203.) The defendant had represented himself during the trial and there was no evidence that he had failed to cooperate with his advisory counsel. Second, although the letters by the defendant's family and friends showed concern about the defendant's mental state, they "convey[ed] little about defendant's competence to stand trial," since they did not address his "ability to understand the proceedings or assist in his defense." (*Ibid.*)

Defendant contends *Mickel* is distinguishable because the letters here referenced defendant's thinking "during the court proceedings themselves" and defendant's interactions with his attorney.

Having reviewed the probation report, the letters from defendant's friends and family, and the trial record, we find no substantial evidence raising a doubt as to defendant's competence prior to the sentencing hearing. Although there was evidence that defendant had a long history of bizarre behavior and mental illness, nothing in the letters indicated that defendant lacked an "understanding of the criminal proceedings against him" or lacked "the ability to consult with counsel or otherwise assist" in his defense. (See *Mickel, supra,* 2 Cal.5th at p. 202; see also *People v. Halvorsen* (2007) 42 Cal.4th 379, 403.) Rather, the letters mainly showed "generalized concerns" about

defendant's mental state prior to and at the time of the stabbings. (*Mickel, supra,* at p. 203.)

Defendant focuses on the letter from his aunt, which described defendant's reluctance to talk to his attorney about the voices in his head. However, defendant's failure to tell his attorney about the voices in his head did not show that he lacked "the ability to consult with counsel" about legal strategy (*Mickel, supra,* 2 Cal.5th at p. 202), particularly since nothing in the letter indicated that defendant was hearing such voices or failed to communicate with his attorney during the actual trial (cf. *People v. Pennington* (1967) 66 Cal.2d 508, 516). Likewise, substantial evidence of incompetence was not provided by the letter from the Florida psychiatrist, which related defendant's mother's claim that the voices in defendant's head had told him to remain silent rather than present a defense at trial. The Supreme Court has "rejected the notion that a defendant's choice not to present a defense, even at the penalty phase, amounts to substantial evidence of incompetence." (*Blair, supra,* 36 Cal.4th at p. 718.)

Defendant's statement to the probation officer about his plan to plead not guilty by reason of insanity also did not provide substantial evidence of his incompetence. The statement arguably shows defendant did not understand the difference between an appeal and a change of plea. However, that single statement was insufficient to raise a doubt as to defendant's *ability* to understand the proceedings, particularly in light of defendant's other statements to the probation officer, including his statement about how he planned to prepare a statement for the upcoming sentencing hearing.

Finally, nothing in the trial transcripts indicates that during trial, defendant exhibited any behavior or made any statements indicating that he lacked " 'sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding . . . [or] a rational as well as factual understanding of the proceedings against him [or her].' [Citations.]" (*Mickel, supra,* 2 Cal.5th at pp. 194-195; see also *id.* at p. 202.)

On this record, we find no substantial evidence raising a reasonable doubt as to defendant's competence between the jury's verdicts and the sentencing hearing. Thus, the trial court did not err by failing to declare a doubt as to defendant's competence pursuant to section 1368. (*Lightsey, supra,* 54 Cal.4th at p. 691.)

B. Imperfect Self-Defense

Defendant contends the trial court erred by failing to instruct on imperfect self-defense. He asserts that the trial court had a sua sponte duty to give an imperfect self-defense instruction because there was substantial evidence that he actually but unreasonably believed he was in imminent danger of death or great bodily injury. He contends the error violated his due process rights under the state and federal constitutions and his Sixth Amendment right to a jury trial.

1. Legal Principles

A killing committed when the perpetrator " 'holds an honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury' " constitutes manslaughter. (*People v. Elmore* (2014) 59 Cal.4th 121, 134 (*Elmore*).) "Whenever there is substantial evidence that the defendant killed in unreasonable self-defense, the trial court must instruct on this theory of manslaughter. [Citation.]" (*Ibid.*) "Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed. [Citations.] Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense. [Citations.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132 (*Simon*).)

"We review de novo a trial court's decision not to give an imperfect self-defense instruction. [Citations.]" (*Simon, supra,* 1 Cal.5th at p. 133.)

2. Analysis

Defendant contends that substantial evidence of his belief in the need to defend himself came from the following evidence: (1) the fact that it was dark and the area behind the library was small; (2) Becerra's testimony about hearing some "scuffling" and

the fact that there were three individuals in Long's group; (3) Long's high blood alcohol content and bruises; (4) defendant's statement that the victims "deserved to die." Defendant contends that in light of the evidence of his mental illness, a reasonable jury could have found that he unreasonably believed he needed to defend himself. He also asserts that because Long was found holding an iPad and an iPhone, a jury could reasonably have found that defendant believed Long had a weapon.

After a careful review of the record, we find no substantial evidence supporting an imperfect self-defense instruction in this case. No evidence indicates that anyone other than defendant was the aggressor in the incident, and there was no evidence that defendant perceived that either victim "posed a risk of imminent peril." (See *Simon, supra,* 1 Cal.5th at p. 133.)

Becerra's testimony about hearing some "scuffling" lasting for "[a] couple minutes" did not provide a basis for finding that defendant honestly believed he was in imminent physical danger. Defendant asserts that the jury could have found that defendant was engaged in an extended fight with Long's group that led him to believe he needed to defend himself by stabbing Long. But contrary to defendant's assertion, there was no evidence that the "scuffle" was "three against one." Becerra initially testified that after hearing the "scuffle," he looked in that direction "for a brief moment" and saw defendant running away. On cross-examination, Becerra acknowledged seeing "four people standing upright" after hearing the scuffle. When asked, "And the four of them are engaged in a fight?" Becerra responded, "I believe so. Like I said, it was a brief blur. It was a brief moment." Becerra also responded, "Yes" when asked if, after hearing the scuffle for a few minutes, he looked up to "see four people standing up fighting." It would be speculative to find that any of this testimony showed that defendant was involved in an "extended scuffle" with Long's group prior to the stabbing, that defendant was not the initial aggressor, or that defendant held " 'an honest but unreasonable belief

in the necessity to defend against imminent peril to life or great bodily injury' " at the time he stabbed Long. (*Elmore, supra,* 59 Cal.4th at p. 134.)

The evidence of Long's high blood alcohol content and bruises also did not provide a basis for finding that Long took any aggressive action towards defendant prior to the stabbing. It would be entirely speculative to conclude that Long was aggressive just because he was very drunk. Moreover, there was expert testimony that Long's bruises were consistent with defensive wounds, and there was no evidence that defendant had any injuries.

Defendant's statement that the victims "deserved to die" also does not show "that he had acted out of fear" rather than out of mere anger at Long's refusal to share his alcohol. (See *Simon, supra,* 1 Cal.5th at p. 134.)

Finally, on this record it would be speculative to conclude that defendant's mental illness or Long's possession of two electronic devices "contributed to the mistaken perception of a threat," since defendant presented no such evidence. (*Elmore, supra,* 59 Cal.4th at p. 146.)

Since there was no substantial evidence that defendant killed Long in the " 'honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,' " the trial court did not err by failing to instruct on imperfect self-defense. (See *Elmore, supra,* 59 Cal.4th at p. 134.)

C. Heat of Passion/Provocation

As noted above, the trial court instructed the jury on voluntary manslaughter based on sudden quarrel/heat of passion. (See CALCRIM No. 570.) Defendant contends the trial court erred by failing to further instruct the jury on "imperfect heat of passion" and by refusing to instruct on provocation pursuant to CALCRIM No. 522. He contends the errors violated his due process rights under the state and federal constitutions as well as his Sixth Amendment right to a jury trial.

1. Proceedings Below

Defendant's written jury instruction list included a request for CALCRIM No. 522. That instruction would have told the jury that provocation can reduce a murder from first degree to second degree and may reduce a murder to manslaughter.[2] The trial court did not give CALCRIM No. 522, however.

The trial court instructed the jury on murder pursuant to CALCRIM Nos. 520 and 521, which explained that if the jury found that defendant committed murder, it was "murder of the second degree" unless the prosecution proved beyond a reasonable doubt that defendant "acted willfully, deliberately, and with premeditation." The instructions further explained that "[t]he defendant acted deliberately if he carefully weighed the considerations for and against his choice," that he "acted with premeditation if he decided to kill before completing the acts that caused death," and that "[a] decision to kill made rashly, impulsively or without careful consideration is not deliberate and premeditated."

The trial court also instructed the jury, pursuant to CALCRIM No. 570, that "if the defendant killed someone because of a sudden quarrel or in the heat of passion," the murder would be "reduced to voluntary manslaughter." That instruction told the jury that "[t]he defendant killed someone because of a sudden quarrel or in the heat of passion if: One, the defendant was provoked. Two, as a result of the provocation the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment. And, three, the provocation would have caused a person of average disposition to act rashly and without due deliberation; that is, from passion rather than from judgment." CALCRIM No. 570 also told the jury that "slight or remote provocation

[2] The pattern instruction provides: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]" (CALCRIM No. 522.)

is not sufficient" and that "[t]he defendant is not allowed to set up his own standard of conduct." The jury was told that "In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts would have reacted from passion rather than from judgment."

2. Failure to Instruct on "Imperfect Heat of Passion"

"To reduce a murder to second degree murder, premeditation and deliberation may be negated by heat of passion arising from provocation. [Citation.] If the provocation would not cause an average person to experience deadly passion but it precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder. [Citation.]" (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1306 [provocation that is insufficient to reduce the offense from murder to manslaughter may raise a reasonable doubt that the defendant deliberated and premeditated].)

The Attorney General contends such an instruction would have been "largely duplicative" of the instructions given, which told the jury that if the prosecution did not prove defendant acted deliberately and with premeditation, the murder would be second degree.

Defendant cites no case holding that a trial court has a sua sponte duty to instruct the jury on what he calls "imperfect heat of passion."[3] And our Supreme Court has held that an instruction on this principle "is a 'pinpoint instruction' relating particular evidence

[3] On appeal, defendant proposes the following instruction: "If you conclude that provocation may have played a part in the unlawful killing, but you conclude beyond a reasonable doubt that the provocation would not have led a reasonable person to act rashly, you should consider whether the provocation actually, but unreasonably, caused the defendant to act without premeditation and deliberation. [¶] If you find that the prosecution has not proved beyond a reasonable doubt that the defendant did not kill as a result of provocation that actually but unreasonably caused him/her to act rashly, and without premeditation and deliberation, you must find the defendant not guilty of first degree murder."

to an element of the offense, and therefore need not be given on the court's own motion." (*People v. Rogers* (2006) 39 Cal.4th 826, 878 (*Rogers*).)

Defendant contends an instruction on "imperfect heat of passion" would not be a pinpoint instruction because the absence of heat of passion is an element of murder. However, the jury *was* instructed that the People had the burden of proving that defendant did not kill in the heat of passion. As defendant concedes, "there has not yet been formal recognition of the doctrine of imperfect heat of passion." Thus, we follow our Supreme Court in holding that an instruction on that doctrine is a pinpoint instruction that need not be given sua sponte. (See *Rogers, supra,* 39 Cal.4th at p. 878.)

Since defendant's trial counsel did not request a pinpoint instruction on "imperfect heat of passion," the trial court did not err by failing to give such an instruction sua sponte.

3. Refusal of Provocation Instruction

As noted above, defendant's written list of requested instructions included CALCRIM No. 522, but the trial court did not give that instruction. The record does not contain any discussion about why the trial court declined to give the instruction. To the extent his failure to further pursue the instruction forfeited the issue on appeal, defendant contends he received ineffective assistance of counsel. We will assume that defendant's written request adequately preserved the issue for appeal and proceed to consider the merits of his claim.

"A trial court must give a requested instruction only if it is supported by substantial evidence, that is, evidence sufficient to deserve jury consideration. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 39-40.) The trial court should instruct the jury that provocation is relevant to the degree of murder "if there is evidence from which the jury could find that the defendant's decision to kill was a direct and immediate response to the provocation such that the defendant acted without

premeditation and deliberation. [Citations.]" (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705 (*Fenenbock*).)

The record in this case contains no substantial evidence to support a finding that defendant's decision to kill Long "was a direct and immediate response" to provocation. (See *Fenenbock, supra,* 46 Cal.App.4th at p. 1705.) Misamore testified that after being rebuffed by Long, defendant sat down and appeared to "brood[] on" what had just happened. According to both Misamore and Abercrombie, defendant did not start stabbing Long until about 10 minutes later. Becerra likewise heard defendant return to his sleeping bag for some time after interacting with Long's group.

Contrary to defendant's claim, the prosecutor did not concede that defendant was provoked, such that a provocation instruction should have been given. The prosecutor discussed the fact that "adequate provocation" would reduce a murder to manslaughter. The prosecutor noted that defendant was apparently "provoked" by Long rebuffing his request for a drink, but the prosecutor immediately asserted that it was not "adequate provocation." This was not a concession that defendant's decision to kill Long "was a direct and immediate response" to provocation. (See *Fenenbock, supra,* 46 Cal.App.4th at p. 1705.)

In sum, the trial court did not err by failing to instruct the jury on provocation pursuant to CALCRIM No. 522.

D. Prosecutorial Misconduct During Closing Argument

Defendant contends the prosecutor committed misconduct during closing argument by (1) misstating the evidence, (2) commenting on defendant's failure to testify and shifting the burden of proof, (3) misstating the law, and (4) referencing his own personal experience. Defendant acknowledges that his trial counsel did not object to these instances of claimed error, and thus he contends he received ineffective assistance of counsel.

1. Legal Standards

The general rules applying to claims of prosecutorial misconduct are as follows: "Under the federal Constitution, to be reversible, a prosecutor's improper comments must ' "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citations.] ' "But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citations.]' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000 (*Cunningham*).) When the claim of prosecutorial misconduct "is based upon 'comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]' [Citations.]" (*Id.* at p. 1001.)

"A defendant generally ' " 'may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' " [Citation.]' [Citation.] A defendant's failure to object and to request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.)

" 'In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.] If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless

there simply could be no satisfactory explanation." [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.]' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*); see *Strickland v. Washington* (1984) 466 U.S. 668, 690, 694.)

2. Misstating the Evidence

Defendant contends the prosecutor committed misconduct by telling the jury that "all three" eyewitnesses (Misamore, Abercrombie, and Becerra) had testified "identically" that defendant "was the aggressor." Defendant asserts that the testimony of the three eyewitnesses was not identical, in that only Becerra testified that there had been a "scuffle" prior to the stabbing and that the witnesses differed on details such as whether defendant sat down or lay down after Long refused to give him any alcohol. Defendant also contends the prosecutor misstated the evidence by arguing that Becerra told police that defendant had been "the initial aggressor." Defendant acknowledges that his trial counsel did not object to these statements, and thus he contends he received ineffective assistance of counsel.

It is misconduct for the prosecutor to misstate the facts, but "[p]rosecutors have wide latitude to discuss and draw inferences from the evidence at trial." (*People v. Dennis* (1998) 17 Cal.4th 468, 522 (*Dennis*).) It is the jury's job to decide "[w]hether the inferences the prosecutor draws are reasonable," and on appeal "we must view the statements in the context of the argument as a whole. [Citation.]" (*Ibid.*) "Ultimately, the test for misconduct is whether the prosecutor has employed deceptive or reprehensible methods to persuade either the court or the jury." (*Ibid.*)

Although there were minor variations, the testimony of the three eyewitnesses was very similar, particularly with respect to the fact that defendant had initiated the violence. Misamore testified that defendant started stabbing Long after being told he could not

drink with the group, sitting down, and lighting a cigarette. Abercrombie testified that defendant lit a cigarette, lay down for a while, and then got up and started stabbing Long. Becerra testified that defendant asked for a lighter and returned to his sleeping bag, after which there was "some scuffling" involving defendant, who was standing up again. Although Becerra did not explicitly testify that defendant was the aggressor, his testimony permitted that inference. Because the prosecutor did not "substantially misstate the facts or go beyond the record" (*Dennis, supra,* 17 Cal.4th at p. 522), he did not commit misconduct by arguing that the three eyewitnesses testified "identically" that defendant "was the aggressor," and defendant's trial counsel was not ineffective for failing to object to those remarks.

Similarly, the prosecutor did not commit misconduct by arguing that Becerra told police that defendant had been "the initial aggressor." Although at trial Becerra denied seeing the incident begin, Becerra told the police that defendant had made "an aggressive motion towards Long" and that defendant had either punched or pushed Long. The prosecutor's assertion was a reasonable inference from this evidence (see *Dennis, supra,* 17 Cal.4th at p. 522), and thus defendant's trial counsel was not ineffective for failing to object to the challenged remark.

3. *Griffin* Error/Burden-Shifting

Defendant contends the prosecutor committed *Griffin* error (*Griffin v. California* (1965) 380 U.S. 609) during closing argument by claiming there was "[u]nrebutted testimony" and "uncontroverted facts." He also contends that the prosecutor's improper comments improperly shifted the burden of proof to the defense. Acknowledging that his trial counsel failed to object to the comment, defendant contends he received ineffective assistance of counsel.

The prosecutor's challenged remark about "uncontroverted facts" came during his discussion of the facts that he considered to be "significant." Those facts included: (1) defendant was not part of Misamore and Long's group; (2) defendant asked for a

drink of Long's vodka but was refused; (3) some time passed after that refusal; (4) defendant stabbed Long with a knife; (5) the stabbing caused Long to go backwards; (6) defendant was the aggressor; (7) defendant stabbed Long three times after the initial stabbing; (8) the stab to Long's heart caused his death; (9) Misamore pulled defendant off Long; (10) Long had wounds that were consistent with defending himself; (11) there were no "weapons ready for use" found at the scene; (12) defendant fled from the scene and discarded the knife. The prosecutor told the jury, "These are uncontroverted facts here." He also described the evidence about defendant asking for a drink of vodka as "[u]nrebutted testimony."

In *Griffin*, the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify in his or her own behalf. The holding of *Griffin* "does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339 (*Bradford*).) Thus, "a prosecutor may commit *Griffin* error if he or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand. [Citations.]" (*Ibid.*)

In *Bradford*, the prosecutor argued that the victims "had been killed for pleasure" and told the jury, " '[T]here is no evidence to the contrary.' " (*Bradford, supra*, 15 Cal.4th at p. 1338.) Although the defendant was "the sole remaining witness," the *Bradford* court found no *Griffin* error, explaining, "The prosecutor did not allude to the lack of refutation or denial by . . . defendant, but rather to the lack of *evidence*, which might have been presented in the form of physical evidence or testimony other than that of defendant." (*Id.* at p. 1340.) The *Bradford* court also rejected the notion that the prosecutor's comments had impermissibly shifted the burden of proof to the defendant. The court noted that the prosecutor had reminded the jury of the burden of proof and

found, "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*Ibid.*)

No *Griffin* error was found in *People v. Foster* (1988) 201 Cal.App.3d 20 (*Foster*), where the prosecutor told the jury that documents submitted to prove a prior conviction allegation " 'remain[ed] uncontroverted,' " in that "[n]o one" had testified or introduced any evidence to controvert them. (*Id.* at p. 26.) The appellate court found no prosecutorial misconduct, explaining that *Griffin* "does not prohibit a prosecutor from commenting on the failure of the defense to introduce material evidence. [Citation.]" (*Foster, supra*, at p. 26.)

In the present case, the prosecutor's comments did not run afoul of *Griffin* nor improperly shift the burden of proof to the defense. The prosecutor's "[u]nrebutted testimony" and "uncontroverted facts" comments were "based upon the state of the evidence" and did not implicitly reference defendant's failure to testify. (See *Bradford, supra,* 15 Cal.4th at p. 1339.) Even assuming defendant was "the sole remaining witness" who had been present during the event (*id.* at p. 1340), the prosecutor's comments would not reasonably have been understood to be comments about defendant's failure to testify. A reasonable juror would have understood the prosecutor to be discussing the strength of his case and the lack of any evidence to support the defense claim of self-defense.

Because the prosecutor's challenged comments were not improper, defendant's trial counsel was not ineffective for failing to object.

4. Misstatement of Law

Defendant contends his trial counsel was ineffective for failing to object when, during argument to the jury, the prosecutor misstated the law regarding premeditation and

deliberation by equating those elements to "a conscious decision" about driving through a yellow light.

The prosecutor told the jury that premeditation related to "the length of time" and that it did not need to be "a long period of time." The prosecutor asserted, "It could be done very shortly" and then provided an example in which a person is "approaching an intersection." The prosecutor continued: "You drive up to the intersection. And all the sudden, about 150 feet from the intersection, the light turns yellow. Okay. Everybody has been in that situation. So the decision has to be made, do I go through or do I stop. And I would submit that just about every person who decides to go through that yellow light makes . . . a conscious decision. And what do they look for when they go through that yellow light? Cars or cops. And . . . when you do that, you've made that decision. You've decided. You've deliberated. You've thought and then you acted. And that's how long—that's the length of time that it can take to get that deliberation and premeditation."

Defendant acknowledges that a similar analogy was not found to be misconduct in *People v. Avila* (2009) 46 Cal.4th 680 (*Avila*). In that case, "the prosecutor used the example of assessing one's distance from a traffic light, and the location of surrounding vehicles, when it appears the light will soon turn yellow and then red, and then determining based on this information whether to proceed through the intersection when the light does turn yellow, as an example of a 'quick judgment' that is nonetheless 'cold' and 'calculated.' " (*Id.* at p. 715.) After making that analogy, the prosecutor "immediately said, 'Deciding to and moving forward with the decision to kill is similar, but I'm not going to say in any way it's the same. There's great dire consequences that have a difference here.' " (*Ibid.*) The *Avila* court found no prosecutorial misconduct since the prosecutor was not equating " 'the "cold, calculated" judgment of murder" ' " with " 'deciding whether to stop at a yellow light or proceed through the intersection.' " (*Ibid.*)

Defendant contends *Avila* is distinguishable because in this case, the prosecutor "did not list numerous separate factors considered by the hypothetical driver" and did not argue that a driver would use that information in making a decision. The record does not support that claim. The prosecutor here, like the prosecutor in *Avila,* referenced three factors that a driver would assess in making the decision to enter an intersection after seeing a yellow light: the distance from the traffic light, the presence of other cars, and the presence of "cops."

Defendant also contends *Avila* is distinguishable because here the prosecutor did not "add the qualifier" of telling the jury that the decision to kill and the decision to enter an intersection were not actually the same. We read *Avila* differently. The "qualifier" added in *Avila* concerned the different consequences of a decision to kill versus a decision to enter an intersection. The *Avila* prosecutor did not qualify the analogy with respect to the mental state of a person deciding whether to kill and a person deciding whether to enter an intersection when there is a yellow light. Thus, in this case, as in *Avila,* where the prosecutor used the yellow light analogy as an example of a decision-making process, there was no prosecutorial misconduct. And because the prosecutor's remarks were not improper, defendant's trial counsel was not ineffective for failing to object.

5. "Open and Shut Case" Comment

Defendant contends the prosecutor committed misconduct and his trial counsel was ineffective for failing to object when, during argument to the jury, the prosecutor twice referred to the case as "an open and shut case."

After the prosecutor discussed the facts of the case, he told the jury, "At some point you might be asking what are we doing here. What's the deal? It seems like a pretty—at the risk of sounding a little bit presumptuous here, it seems like a pretty open and shut case. Why are we having a trial on this." The prosecutor then explained that "[e]verybody is entitled to a trial" and that the prosecution had to prove its case. The

prosecutor noted that his case would have been difficult if witnesses had not showed up for trial but that the prosecution would have attempted to proceed based on "physical evidence only." He continued: "But they did show up. So that buttresses our case quite a bit. And that's why it might appear to you to be somewhat of an open and shut case. Again, if I'm presumptuous on that, I apologize."

Defendant contends that by referring to the case as "open and shut," the prosecutor engaged in improper vouching. "[I]t is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. [Citations.] Specifically, a prosecutor's reference to his or her own experience, comparing a defendant's case negatively to others the prosecutor knows about or has tried, is improper. [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.)

In this case, the comments at issue did not constitute misconduct. The prosecutor did not imply that this case was "open and shut" as compared to other criminal cases that he had tried. In context, his comments reasonably would have been understood by the jury simply as "an invitation to draw the desired inference": that the prosecution had presented a strong case showing defendant's guilt. (Cf. *People v. Johnson* (1992) 3 Cal.4th 1183, 1226.) Because the prosecutor's remarks were not improper, defendant's trial counsel was not ineffective for failing to object.[4]

E. Evidence of Defendant's Prior Arrest

Defendant contends the trial court erred by denying his motion for a mistrial after Officer Nino mentioned that defendant had been arrested on May 25, 2015. Defendant also contends the prosecutor committed misconduct by failing to admonish Officer Nino

[4] Defendant requests this court take judicial notice of two prior unpublished opinions in which the same prosecutor was found to have engaged in prosecutorial misconduct. Having found no prosecutorial misconduct in this case, we deny the request for judicial notice. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 847 & fn. 9 (*Hill*).)

prior to his testimony and by failing to edit a photograph of defendant being arrested. Defendant further contends his trial counsel was ineffective for failing to object to the photograph.

1. In Limine Motion and Ruling

The prosecution filed a motion in limine seeking to introduce evidence of a police contact defendant had on May 25, 2015, less than one month before the stabbings. The prosecution sought to introduce testimony from "Monterey Police Officer Reed" as well as a video and photographs that showed defendant wearing a blue hooded sweatshirt and carrying a backpack, which contained two knives, one in a black sheath and one in a brown sheath. Attached to the prosecution's motion were a number of photographs, including Exhibit No. 9, a photograph of defendant with officers on either side of him. Defendant was wearing a blue hooded sweatshirt, and his hands were behind his back, apparently in handcuffs. Other photographs showed the backpack and the knives.

At the hearing on motions in limine, the prosecutor confirmed that Exhibit No. 9 showed defendant being escorted by officers following his arrest for a battery. The prosecutor offered to "excise out any reference to" defendant's arrest. He also offered to redact Exhibit No. 9 "to make it look like defendant is not being arrested." Defendant's trial counsel objected to the evidence and specifically characterized Exhibit No. 9 as "extremely prejudicial."

The trial court found that the evidence of defendant police contact on May 25, 2015 was relevant to show that defendant "had access to two knives and possessed knives." The trial court ordered that Exhibit No. 9 be "edited so that [defendant] is not being shown in custody."

2. Officer Nino's Testimony and Mistrial Motion

When Officer Nino testified, the prosecutor asked him about his "contact" with defendant on May 25, 2015. Officer Nino identified defendant in court and in Exhibit No. 9A, a cropped version of Exhibit No. 9 that showed defendant but not the two police

officers. Officer Nino also identified the backpack that defendant had with him on May 25, 2015, describing it as "the backpack that [defendant] had on him at the time of his arrest."

The trial court held an unreported bench conference following Officer Nino's reference to defendant's arrest. The prosecutor subsequently asked Officer Nino to confirm that defendant "was not arrested that day for anything," and Officer Nino indicated that was correct: "No fresh charges, no."

Defendant's trial counsel later moved for a mistrial based on Officer Nino's mention of defendant's arrest. Defendant's trial counsel explained that he "made a strategic decision not to make a motion to strike" at the time of the testimony because he "didn't want to bring attention to it in front of the jury."

The trial court noted it had "admonished" the prosecutor during the unreported bench conference, telling the prosecutor "that he needed to talk to his witnesses and make sure that they were aware of the Court's rulings, in limine rulings." The trial court had learned that defendant had been arrested on May 25, 2015, but "on a warrant" rather than on new charges. The trial court had suggested that the prosecutor ask a follow-up question to clarify that defendant had not been arrested on new charges so as to "minimize any potential impact" of Officer Nino's reference to the arrest.

The prosecutor asserted that Officer Nino had been "a late addition" to his planned witnesses because the officer he had planned to call was on vacation. The prosecutor had not had an opportunity to talk to Officer Nino about the in limine ruling.

The trial court denied the mistrial motion, finding that "while the statement was unfortunate, . . . any impact it may have had was lessened by the follow-up questions." The trial court found that the improper testimony did not "rise[] to the level" of requiring a mistrial.

3. Analysis - Mistrial Motion

" 'A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court's ruling denying a mistrial.' [Citations.]" (*People v, Clark* (2011) 52 Cal.4th 856, 990 (*Clark*).)

Defendant contends the testimony about his prior arrest constituted " 'incurable prejudice' " because the jury learned—from Officer Nino's "[n]o fresh charges" statement—that defendant had been charged with a crime prior to the stabbing incident. He contends the trial court failed to recognize that the prosecutor's follow-up question, though intended to elicit the fact that defendant was not arrested that day, resulted in the jury learning that defendant had a prior arrest at some point. Defendant also contends that this was a close case in which evidence of his prior criminality "would have played a major role in the jury's verdict."

The Attorney General directs us to several cases where similarly brief references to prior criminality did not require the trial court to grant a motion for a new trial. For instance, in *People v. Valdez* (2004) 32 Cal.4th 73, an officer testified that he interviewed the defendant while he was at " 'Chino Institute,' " which revealed that the defendant was in custody. (*Id.* at p. 124.) But since the comment was "brief and isolated," the trial court did not err by denying the defendant's motion for a mistrial. (*Id.* at p. 128; see also *People v. Bolden* (2002) 29 Cal.4th 515, 555 [brief reference to a parole office was "not significant in the context of the entire guilt trial" and did not require a mistrial]; *People v. Collins* (2010) 49 Cal.4th 175, 199 [mistrial properly denied after a witness gave "brief and ambiguous" testimony about defendant being in prison].)

The testimony in this case was likewise brief, ambiguous, and insignificant in the context of the entire trial. Although Officer Nino initially referenced defendant's arrest on May 25, 2015, he clarified that defendant had not actually been arrested that day. His testimony that defendant had "[n]o fresh charges" was ambiguous and did not suggest

that defendant had a violent criminal history. Further, the case was not so close that it would be incurably prejudicial to admit evidence suggesting defendant had some prior criminal charges. There was no dispute that defendant stabbed Long, and there was overwhelming evidence supporting a finding that the stabbing was done with premeditation and deliberation. On this record, the trial court did not abuse its discretion by determining that defendant's " 'chances of receiving a fair trial' " were not irreparably damaged by Officer Nino's testimony, and thus the trial court did not err by denying defendant's motion for a mistrial. (See *Clark*, *supra*, 52 Cal.4th at p. 990.)

4. Analysis – Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct by failing to admonish Officer Nino about the trial court's ruling regarding the May 25, 2015 incident.

" 'Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.' " (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380.) In this case, it is clear from the record that the prosecutor did not intentionally elicit the testimony about defendant's arrest, and thus that the prosecutor did not use " ' " ' "deceptive or reprehensible methods to attempt to persuade . . . the jury." ' " ' " (See *Cunningham*, *supra*, 25 Cal.4th at p. 1000; see also *People v. Erickson* (1997) 57 Cal.App.4th 1391, 1403 [prosecutor's failure to prevent expert witness from giving testimony in violation of trial court's order did not "amount to 'a deceptive or reprehensible method of persuasion' "].)

Defendant also contends the prosecutor committed misconduct by failing to further edit Exhibit No. 9, the photograph of defendant being arrested. Defendant contends the cropped photograph (Exhibit No. 9A) still "clearly showed that [he] was in custody."

Again, the record fails to support defendant's prosecutorial misconduct claim. We have reviewed the cropped version of the photograph (Exhibit No. 9A), which shows defendant only. There are no officers in the photograph, and although defendant's hands

are behind his back, one could only speculate that he was in handcuffs. The prosecutor followed the trial court's instructions to that Exhibit No. 9 be "edited so that [defendant] is not being shown in custody"; he did not use " ' " ' "deceptive or reprehensible methods to attempt to persuade . . . the jury." ' " ' " (See *Cunningham, supra,* 25 Cal.4th at p. 1000.)

5. Analysis – Ineffective Assistance of Counsel

Defendant contends his trial counsel was ineffective for failing to object to Exhibit No. 9A, the cropped version of the photograph taken during defendant's police contact on May 25, 2015.

As explained above, the cropped version of the photograph (Exhibit No. 9A) showed defendant only, with no officers. Although defendant had his hands behind his back in the photograph, it is not apparent that defendant is in handcuffs. Thus, the photograph did not violate the trial court's order that the original photograph be "edited so that [defendant] is not being shown in custody" and trial counsel's failure to object did not fall below " ' "an objective standard of reasonableness." ' " (*Lopez, supra,* 42 Cal.4th at p. 966.)

F. Becerra's Prior Statement

Defendant contends the trial court erred by admitting (through the testimony of Officer Hall) Becerra's prior statement that defendant had made an "aggressive motion" towards Long. The trial court admitted the prior statement as a prior inconsistent statement pursuant to Evidence Code section 1235 and as past recollection recorded under Evidence Code section 1237.

1. Proceedings Below

Becerra testified that he "heard a scuffle" and then saw defendant running away. He did not "recall seeing anything else, because it was all in a blur." He gave a statement to the police the next day, when his memory was "much more fresh." When shown his statement, Becerra still could not recall further details of the incident. However, Becerra

did remember telling Officer Hall that defendant had "made an aggressive motion towards Long."

The prosecutor requested he be permitted to call Officer Hall to testify about Becerra's statement, asserting that the statement would qualify as either past recollection recorded or a prior inconsistent statement.

Defendant argued that Becerra had been "deliberately trying to mislead" the court when he claimed he did not remember details of the incident, and thus that Becerra's prior statement to police was not admissible as a prior inconsistent statement under Evidence Code section 1235. Defendant acknowledged that if a transcript of Becerra's statement had been prepared and was authenticated, the statement was likely admissible as past recollection recorded under Evidence Code section 1237, but he argued that the trial court should only admit part of the statement.

The trial court ruled that the prosecutor could elicit three of Becerra's statements to Officer Hall: (1) that defendant made an aggressive move toward Long; (2) that Long fell back towards the wall; and (3) that Misamore jumped on defendant's back in an attempt to pull defendant away from Long. The trial court found that the statements were admissible under Evidence Code section 1235 and under Evidence Code section 1237.

Officer Hall then testified about his interview of Becerra. According to Officer Hall, Becerra said that defendant "made an aggressive motion towards [Long] and either punched or pushed [Long]." Becerra said that Long then fell backwards and hit his head on a retaining wall, and that Misamore then jumped on defendant's back "and was pulling him away" from Long.

2. Legal Principles

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic

evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

Evidence Code section 1237 provides: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement. [¶] (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party."

"We review the trial court's rulings on the admission of evidence for abuse of discretion. [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 462 (*Cowan*).)

3. Analysis

Defendant first challenges the admission of Becerra's statement under Evidence Code section 1235, arguing that the statement was not inconsistent with his trial testimony. As defendant points out, Becerra testified that he told Officer Hall that defendant had "made an aggressive motion towards Long." Thus, we agree that Becerra's statement to Officer Hall about defendant making "an aggressive motion towards" Long was not inconsistent with Becerra's testimony at the hearing, as required for admission under Evidence Code section 1235. (See *Cowan, supra,* 50 Cal.4th at

p. 462 [exception requires " 'the statement in fact be *inconsistent* with the witness's trial testimony' "].)

Defendant next challenges the admission of Becerra's statement under Evidence Code section 1237. He first argues that the trial court erred by finding that Becerra had "insufficient present recollection to enable him to testify fully and accurately" (Evid. Code, § 1237, subd. (a)) about the stabbing. Defendant points out that when testifying, Becerra *recalled* telling Officer Hall that defendant had made "an aggressive motion towards" Long. However, Becerra also testified he did *not* recall most other details of the stabbing incident. Thus, the trial court did not abuse its discretion by finding that Becerra's interview with Officer Hall "concern[ed] a matter as to which" Becerra had "insufficient present recollection to enable him to testify fully and accurately." (Evid. Code, § 1237, subd. (a).)

Defendant also contends Becerra's statement should not have been admitted under Evidence Code section 1237 because "Officer Hall never authenticated that his police report was 'an accurate record' of Becerra's statement." (See Evid. Code, § 1237, subd. (a)(4) [writing must be "authenticated as an accurate record of the statement"].) Officer Hall did testify that his interview of Becerra was both video and audio recorded, and Officer Hall testified that he wrote a report of the interview. Moreover, Becerra's testimony helped authenticate the report: he remembered telling Officer Hall that defendant had "made an aggressive motion towards Long," and he told the truth to Officer Hall and made the statement when his memory was "much more fresh." The trial court was in the best position to determine whether the foundational requirements of Evidence Code section 1237, including the reliability of the statement, and on this record the trial court did not abuse its discretion by finding those requirements were met. (See *Cowan, supra,* 50 Cal.4th at p. 467.)

G. Cumulative Prejudice

Defendant contends the cumulative effect of the "constitutional, instructional, and evidentiary errors" requires reversal. (See *Hill, supra,* 17 Cal.4th at p. 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].) However, we have found no errors and thus there can be no cumulative prejudice.

H. The Prior Serious Felony Conviction Sentence Enhancement

As stated above, the trial court found true the allegation that defendant had suffered a prior serious felony conviction and, accordingly, imposed a consecutive 5-year term under section 667, subdivision (a)(1), as was statutorily required at the time of defendant's sentencing. (Former §§ 667, subd. (a)(1), amend. approved by voters, Prop. 36, § 2, eff. Nov. 7, 2012, 1385, subd. (b), added by Stats. 2014, ch. 137, § 1.) "On September 30, 2018, the Governor signed Senate Bill [No.] 1393 which, effective January 1, 2019, amend[ed] sections 667(a) and 1385(b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.)" (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).)

Defendant contends remand is required to permit the trial court to exercise its discretion to strike his prior serious felony conviction for the purpose of sentencing him under section 667, subdivision (a). The Attorney General agrees.

Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), "[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) "The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses." (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

Because nothing in Senate Bill No. 1393 suggests a legislative intent that the amendments to sections 667, subdivision (a), and 1385, subdivision (b), apply prospectively only, "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill [No.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill [No.] 1393 becomes effective on January 1, 2019." (*Garcia*, *supra*, 28 Cal.App.5th at p. 973.) Defendant's case was not final on January 1, 2019. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 [" 'a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. [Citations.]' "].)

" 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, [our Supreme Court has] held that the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)

The record before us does not clearly indicate that the trial court would have declined to strike defendant's prior serious felony conviction if it had the discretion to do so for the purposes of sentencing him under section 667, subdivision (a). (Cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for resentencing because "the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence . . . by imposing two additional discretionary one-year enhancements" and describing the defendant as " 'the kind of individual the law was intended to keep off the street as long as possible' "].) Accordingly, we agree with the parties that remand is appropriate in this case to allow the trial court to exercise its

discretion regarding whether to strike defendant's prior serious felony conviction for sentencing purposes.

I. Mental Health Diversion

Defendant contends that the case should be remanded to allow the trial court to determine whether he is eligible for mental health diversion pursuant to former section 1001.36 (Stats. 2018, ch. 34, § 24.), as the statute was initially enacted and became effective on June 27, 2018. Defendant asserts that the statute applies retroactively to him because it ameliorates punishment. Defendant also argues that newly amended section 1001.36 (Stats. 2018, ch. 1005, § 1), which became effective on January 1, 2019 and renders ineligible individuals charged with murder, does not apply retroactively to him because its retroactive application would violate the proscription against ex post facto laws and section 3, which mandates prospective application of the Penal Code unless expressly declared otherwise.

The Attorney General contends that defendant is not entitled to remand because section 1001.36 is not retroactive. The Attorney General also asserts that even if the statute applies retroactively to defendant, he is ineligible for diversion based on the recent statutory amendment.[5]

In view of our determination that the matter must be remanded for resentencing to allow the trial court to exercise its discretion regarding whether to strike defendant's prior serious felony conviction, the trial court shall also consider in the first instance: (1) whether former section 1001.36, as enacted on June 27, 2018, applies retroactively to defendant; and (2) whether current section 1001.36, effective January 1, 2019, applies retroactively to defendant. Should the trial court conclude that either former or current

[5] The Attorney General avers at the outset that defendant is barred from raising this claim pursuant to California Rules of Court, rule 8.200(b) because the claim did not arise after this court's September 12, 2018 decision affirming the judgment. Because the issue has been fully briefed, we exercise our discretion to consider the claim.

section 1001.36 applies retroactively to defendant, it shall determine whether defendant is eligible for mental health diversion pursuant to the terms of the statute. We express no opinion on these issues.

IV. DISPOSITION

Our previous opinion is vacated. The judgment is reversed and the matter is remanded to the trial court for resentencing. The trial court shall determine:

(1) whether to exercise its discretion pursuant to section 667, subdivision (a), and section 1385, subdivision (b);

(2) whether former section 1001.36, as enacted on June 27, 2018, applies retroactively to defendant;

(3) whether current section 1001.36, effective January 1, 2019, applies retroactively to defendant; and

(4) if either former or current section 1001.36 applies retroactively to defendant, whether defendant is eligible for pretrial diversion pursuant to the terms of the statute.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

People v. Quiming
H043494